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No. 96-1339

In The

Supreme Court of the United States

OCTOBER TERM, 1996

CALTEX PETROLEUM CORPORATION, *et al.*,

Petitioners,

v.

VICTOR C. BARIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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March 24, 1997

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MOTION OF THE AMERICAN PETROLEUM INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The American Petroleum Institute ("API") hereby seeks leave pursuant to this Court's Rule 37.2 to file the attached brief as *amicus curiae* in support of the Petitioners, Caltex Petroleum Corporation, *et al.* While consent to file this brief has been obtained from the Petitioners, most of the Respondents have not responded to written and telephonic requests that they grant their consent. Letters to counsel for the parties requesting their consent, and responses from counsel for petitioners and one respondent granting consent, have been lodged with the Clerk.

API, a District of Columbia non-profit corporation, is a national trade association whose more than 300 corporate

members represent all facets of the petroleum industry: exploration, production, transportation, refining and marketing. API frequently participates as *amicus curiae* in judicial proceedings that have national significance and that are likely to be of recurring interest to its members.

Although they are U.S. companies, many members of API (and their international affiliates) have worldwide operations and markets. The international aspects of their business and the attractiveness of U.S. courts to foreign claimants make it inevitable that API members will frequently be sued in U.S. courts with respect to events taking place overseas that have no connection with the U.S. jurisdictions in which the suits are brought. API thus has a strong interest in the development and application of the doctrine of *forum non conveniens*.

In recent years, members of API have secured dismissals of cases brought by foreign claimants in U.S. courts based on the doctrine of *forum non conveniens*. The dismissals have been conditioned on the members' consenting to the jurisdiction of foreign courts and accepting certain other conditions, like those imposed on defendants and acted upon by plaintiffs here, as the "price" of dismissal.[1]

API believes that its participation as *amicus curiae* will provide the Court with a broader perspective on the question presented and will bring into focus the national significance of

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[1] In addition to this case, see *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir. 1984), *overruled in part, In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481 (10th Cir. 1983); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (N.D. Tex. 1995); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

the proper application and enforcement of the *forum non conveniens* doctrine. Accordingly, API respectfully seeks the Court's leave to file the attached brief supporting Petitioners.

Respectfully submitted,

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QUESTION PRESENTED

The question presented by the petition for a writ of certiorari is

> Whether a federal court can protect and effectuate its judgment by enjoining the continued prosecution of a state-court suit brought on behalf of thousands of foreign plaintiffs after the federal court had entered a final, unappealed judgment that (a) dismissed the case "with prejudice" on the ground of *forum non conveniens* and (b) required the defendants to submit to prejudicial conditions guaranteeing that the litigation would go on in the plaintiffs' home country?

Amicus curiae American Petroleum Institute will address two subsidiary questions that are included within the question presented:

1. Whether the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, permits a federal court to protect the claim-preclusive effect of its judgments.

2. Whether a court, in determining the claim-preclusive effect of a previous order of dismissal, may disregard the explicit statement that the dismissal was "with prejudice."

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BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The American Petroleum Institute ("API") is a national trade association whose more than 300 corporate members represent all facets of the petroleum industry: exploration, production, transportation, refining and marketing. API frequently participates as *amicus curiae* in judicial proceedings that have national significance and that are likely to be of recurring interest to its members. As an *amicus*, API takes no

position on the facts or the legal merits of the underlying claims by plaintiffs against defendants. API strongly believes, however, that plaintiffs' Louisiana state-court litigation against defendants should be enjoined, because it is barred by the District Court's 1992 dismissal with prejudice. Since the dismissal order imposed conditions that required the defendants to waive valuable rights, and since plaintiffs have taken advantage of these conditions, it would be particularly unfair to allow the duplicative Louisiana litigation to proceed.

Although they are U.S. companies, many members of API (and their international affiliates) have worldwide operations and markets. The international aspects of their business and the attractiveness of U.S. courts to foreign claimants make it inevitable that API members will frequently be sued in U.S. courts with respect to events taking place overseas that have no connection with the U.S. jurisdictions in which the suits are brought. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 & n. 18 (1981) (American courts are "extremely attractive to foreign plaintiffs" because U.S. law imposes strict liability, plaintiffs may choose from 50 different jurisdictions with different legal rules, jury trials and contingent-fee arrangements are available, and losing parties are not taxed with their opponents' legal costs). API thus has a strong interest in the development and application of the doctrine of *forum non conveniens*.

In recent years, members of API have secured dismissals of cases brought by foreign claimants in U.S. courts based on the doctrine of *forum non conveniens*. The dismissals have been conditioned on the members' consenting to the jurisdiction of foreign courts and accepting certain other

conditions, like those imposed on defendants and acted upon by plaintiffs here, as the "price" of dismissal.[1]

U.S. companies do not accept such conditions lightly, because the consequences of subjecting themselves to the jurisdiction of foreign courts, litigating under foreign legal regimes, and agreeing to pay foreign judgments are significant. API is accordingly concerned that, following *forum non conveniens* dismissals, foreign plaintiffs might be able both to take advantage of the conditions imposed on those dismissals and to pursue duplicative litigation in the United States. That is the situation presented here.

STATEMENT

This case has had a long and complex procedural history. The underlying accident, a collision between two vessels in Philippine waters, occurred in 1987. Litigation began shortly thereafter in courts in the Philippines. A purported class action was also filed in state court in Texas; this action was removed to federal district court, and then dismissed in 1990 on *forum non conveniens* grounds. On appeal, the Fifth Circuit vacated and remanded for a more thorough explication of the *forum non conveniens* analysis. *See Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551-52 (5th Cir.), *cert. denied*, 502 U.S. 963 (1991). The court also required that conditions be imposed on the dismissal to facilitate litigation in the courts of the Philippines. *See id.*

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[1] In addition to this case, see *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d Cir. 1978); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir. 1984), *overruled in part, In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987) (en banc); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481 (10th Cir. 1983); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (N.D. Tex. 1995); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

While this appeal was pending, the plaintiffs filed a second, identical suit in Texas court. This suit was also removed to federal court and consolidated with the first action. The district court then performed the *forum non conveniens* analysis ordered by the Fifth Circuit, and entered an order dismissing the consolidated actions with prejudice. The plaintiffs sought and obtained a number of conditions on this dismissal, including requirements that the defendants (1) consent to service of process and jurisdiction in the Philippines, (2) waive any statute of limitations defense, (3) agree to use in the courts of the Philippines of materials already acquired in U.S. discovery, (4) agree to produce evidence and witnesses in the courts of the Philippines, and (5) agree to satisfy any final judgment of those courts.[2]

After the dismissal, the plaintiffs initiated several suits in the Philippines, taking full advantage of the defendants' concessions. Then, in December 1993, a year after the order of dismissal became final, the plaintiffs served on the defendants an essentially identical class-action suit that they had secretly filed in state court in Louisiana five years earlier, and as to which they had requested that the clerk withhold service. The defendants moved the Texas federal district court to protect and effectuate its dismissal by enjoining the Louisiana action. The district court denied the motion, and the defendants appealed. On different grounds, a panel of the Fifth Circuit affirmed. Rehearing en banc was granted, and the panel's opinion was vacated. The en banc court was, however, equally divided (8 to 8), and so did not reach a decision; this operated to affirm the judgment of the district court. Petitioners have asked the Court to review this decision.

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[2] The plaintiffs appealed from the dismissal order; their appeal was dismissed as untimely in December 1992.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to consider two separate but related issues, each of which has divided the courts of appeals, and each of which is of great importance to the continued vitality of the *forum non conveniens* doctrine. The first of these issues is whether this Court's determination in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), that the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), is limited to "claims or issues" that "actually have been decided by the federal court," 486 U.S. at 148, should be read to prohibit injunctions intended to protect the claim-preclusive effect of a federal court's judgment. The second issue is whether a court assessing the claim-preclusive effect of a previous dismissal is permitted to disregard the previous court's specific statement that the dismissal was "with prejudice."

1. In *Chick Kam Choo*, a federal court dismissed an action on *forum non conveniens* grounds without specifying that the dismissal was "with prejudice." This Court held that the relitigation exception to the Anti-Injunction Act did not allow the federal court to enjoin a subsequent action in Texas state court. The Court said that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." 486 U.S. at 148. Because "the Texas courts would apply a significantly different *forum non conveniens* analysis," the Court concluded that "whether the Texas *state* courts are an appropriate forum" was an issue that had not been litigated in the federal court. *Id.* at 149 (emphasis in original).

The courts of appeals are divided over whether the "actually . . . decided" requirement of *Chick Kam Choo* applies to claim preclusion as well as issue preclusion. The leading case on one side of the split is *Staffer v. Bouchard*

Transportation Co., 878 F.2d 638 (2d Cir. 1989). In *Staffer*, the Second Circuit, citing *Chick Kam Choo*'s statement that the relitigation exception is limited to "claims or issues" that "actually have been decided by the federal court," held that the exception "does not protect the full *res judicata* effect of the [first] court's judgment; rather, it protects only matters that actually have been decided by a federal court." *Id.* at 643. Although *Staffer* did not use the terminology of issue and claim preclusion, it clearly holds that *Chick Kam Choo*'s "actually . . . decided" requirement applies to claim preclusion as well as issue preclusion. The Fifth Circuit appears to agree with the Second Circuit's approach in *Staffer*. *See Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 880 (5th Cir.) (concluding that *Chick Kam Choo* does not permit injunctions to protect the full claim-preclusive effect of a judgment), *cert. denied*, 502 U.S. 866 (1991).[3]

In *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993), the Ninth Circuit specifically rejected this holding of *Staffer*, concluding that to read *Chick Kam Choo* in this way "would in essence be to read *res judicata* entirely out of section 2283." *Id.* at 869-70. Instead, the Ninth Circuit held that the relitigation exception authorizes federal courts to issue injunctions to protect the full claim-preclusive effect of their judgments. The Sixth and Eighth Circuits have adopted a similar approach. *See Huguley v. General Motors Corp.*, 999 F.2d 142, 147-48 (6th Cir. 1993); *Daewoo Electronics Corp. of America, Inc. v. Western Auto Supply Co.*, 975 F.2d 474, 474-78 (8th Cir. 1992); *see also In re G.S.F. Corp.*, 938 F.2d 1467, 1478-79 (1st Cir. 1991) (applying *Chick Kam Choo* by analogy in a bankruptcy

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[3] In *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir.), *cert. denied*, 115 S. Ct. 573 (1994), the court, without citing *Farias*, came to the opposite conclusion in dicta. *Farias* nevertheless remains the law of the Fifth Circuit.

case, and reading it to permit an injunction to protect the terms of a stipulation and release).[4]

This case is an appropriate vehicle for resolving the split between *Staffer* and *Ulloa*.[5] As explained more fully below, *see infra* pp. 10-13, the district court's dismissal "with prejudice" is entitled to claim-preclusive effect. Under *Staffer*'s reading of the Anti-Injunction Act, however, only the issue-preclusive effect of a federal court's judgment may be protected by injunction. As *Chick Kam Choo* made plain, issue preclusion does not run between a federal *forum non conveniens* determination and a state court's application of its own, different *forum non conveniens* analysis.[6] Because the district court's *forum non conveniens* dismissal has no issue-preclusive effect as to the Louisiana proceeding, that

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[4] In *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), the Court declined to reach the question whether the relitigation exception permits the issuance of injunctions "in situations where the later state action involves claims that could have been litigated, but were not actually litigated, in the prior federal action." *Id.* at 526 n.4. The Court's explicit reservation of this question in *Parsons Steel* suggests that *Chick Kam Choo*, which was decided shortly afterwards, and in which the Court also did not need to reach this question, should be read to have left the question open.

[5] Both petitioners and respondents argued this question to the courts below. *See, e.g.*, Pet. C.A. Br. 32 (asserting that a dismissal "with prejudice" is *res judicata* and can serve as the basis of an injunction, and citing *Ulloa* for this proposition); Resp. C.A. Br. 38 (asserting that the relitigation exception may only be applied on a "strong and unequivocal showing of relitigation of the same issue").

[6] *See* 486 U.S. at 148 ("Federal *forum non conveniens* principles simply cannot determine whether Texas courts, which operate under a broad 'open-courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit. . . . Thus, whether the Texas *state* courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.").

proceeding may not be enjoined under *Staffer*'s reading of the Anti-Injunction Act.

Under the approach of *Ulloa*, however, which permits injunctions based on both the issue-preclusive and the claim-preclusive effects of a federal judgment, an injunction would be permitted. The plaintiffs' Louisiana action is based on the same set of facts as the dismissed federal action, and therefore is barred by principles of claim preclusion, and could be enjoined by the district court. See *Restatement (Second) of Judgments* § 24(1) (claim preclusion bars a separate action based on the same "transaction, or series of transactions," as the original action).

Ulloa's is clearly the sounder approach. Although the Court in *Chick Kam Choo* stated that the relitigation exception is limited to "claims or issues" that "actually have been decided by the federal court," 486 U.S. at 148, elsewhere in its opinion, the Court described the relitigation exception as "founded in the well-recognized concepts of *res judicata* and collateral estoppel," implying that the application of claim preclusion would be appropriate. *Id.* at 147. *See also* 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4226 at 202 n.12.1 (1996 Supp.) (concluding that *Staffer* seems an "unduly restrictive" reading of *Chick Kam Choo*).

Staffer's reading of *Chick Kam Choo* also clashes with the plain language of the Anti-Injunction Act. The Act's language permits federal courts to enter injunctions to "protect or effectuate" their judgments. 28 U.S.C. § 2283 (1994). A large class of dismissals have claim-preclusive effect, but no meaningful issue-preclusive effect; these include dismissals for failure to prosecute, dismissals for failure to comply with the Federal Rules or with an order of the court, and dismissals following settlements. Under *Staffer*'s reading of the Act, following a dismissal in one of these categories, the court would have no power to enjoin an identical action brought in

state court; in other words, the court would be powerless to "protect or effectuate" its judgment.[7]

The legislative history of the Anti-Injunction Act confirms the conclusion that Congress intended to permit injunctions to protect a judgment's claim-preclusive effect. Congress added the "protect or effectuate" language to the Anti-Injunction Act with the intention of overruling *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), in which this Court held that the Act lacked a relitigation exception. *See Parsons Steel*, 474 U.S. at 524. The Revisor's Note to § 2283 states that "the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision." *See* H.R. Rep. No. 80-308, at A181-82 (1947), *reprinted in* Revisor's Note to § 2283, 28 U.S.C. p. 503 (1994); *see also Parsons Steel*, 474 U.S. at 524 (citing the Revisor's Note as authority as to Congress's intent in amending section 2283). As generally understood and interpreted before *Toucey*, the relitigation exception permitted injunctions to protect a judgment's claim-preclusive effect. *See* George A. Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 Neb. L. Rev. 643, 662-69 (1993) (citing pre-*Toucey* cases in which such injunctions were entered or approved). The reach of the relitigation exception must therefore be interpreted in light of this pre-*Toucey* practice.

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[7] The facts of *Ulloa* demonstrate what the consequences of this powerlessness would be. In *Ulloa*, the plaintiff in a case that had been proceeding for seventeen years in the United States District Court for the District of Guam (with four appeals to the Ninth Circuit) concluded a settlement, and then filed an essentially identical action in state court. *See Ulloa*, 958 F.2d at 871. Because the case had been settled, issue preclusion did not apply; only an injunction based on claim preclusion would have sufficed to prevent the plaintiff from flouting a settlement arrived at after seventeen years of litigation.

2. Apart from the question whether *Chick Kam Choo* permits injunctions to protect the claim-preclusive effect of a federal judgment, this case presents the question whether a *forum non conveniens* dismissal "with prejudice" should be accorded claim-preclusive effect. Once again, the courts of appeals appear to be divided.

Two Circuits, the Second and the Eighth, are of the view that a district court's statement that its dismissal is "with prejudice" should not be accorded any weight. In their view, a court considering the preclusive effect of a prior dismissal should concern itself only with the grounds for the dismissal, not with the language of the order of dismissal. In *Saylor v. Lindsley*, 391 F.2d 965, 967-68 (2d Cir. 1968), the Second Circuit found that a prior dismissal should not be given claim-preclusive effect, as the dismissal had been for failure to post a bond, and hence was not "on the merits" for *res judicata* purposes. The court noted that the dismissal had been "with prejudice," *see id.* at 967, but did not accord this statement any weight in its analysis. Similarly, in *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (8th Cir. 1995), the court considered only the grounds of the previous dismissal (which had been for lack of jurisdiction), even though the previous dismissal was "with prejudice."

Two other Circuits — the Fifth and the Eleventh — have endorsed a different approach. In the Fifth Circuit case, *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970) (en banc), a district court had dismissed "with prejudice" at the end of a full trial, on the ground that the plaintiff had failed to serve a demand on the defendants. *Id.* at 796-97.[8]

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[8] The vacated Fifth Circuit panel opinion attempted to distinguish *Weissinger*, *see* Pet. App. 54a n.5, but its attempt is wholly unconvincing. *Weissinger*'s interpretation of Fed. R. Civ. P. 41(b) did not turn on "three sentences in rule 41(b) that since have been deleted," but instead on the current language of the Rule. *See Weissinger*, 423 F.2d at 798-99

Weissinger found that this dismissal should be accorded claim-preclusive effect, and hence barred a second suit on the same claim. The *Weissinger* court concluded that it was bound to follow the language of the dismissal order, and read Federal Rule of Civil Procedure 41(b) to mean that a district court may, by specifying that its dismissal is "with prejudice," give claim-preclusive effect to a dismissal that would not otherwise be claim-preclusive. *Id.* at 798-99. The court concluded that the functional approach adopted by the Court in *Costello v. United States*, 365 U.S. 265 (1961), applies only to dismissals that, like the one at issue in *Costello*, do not specifically state whether they are with prejudice. *Id.* at 799. In *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986), the Eleventh Circuit endorsed *Weissinger*'s approach.

Weissinger's approach is superior to that of *Saylor* and *Charchenko*. A district court must have the power to control the claim-preclusive effect of its own judgments; certain situations, like those in *Weissinger* and in the present case, require that a judgment that would not ordinarily be claim-preclusive have claim-preclusive effect. The only instrument by which a district court can exercise this power is through a specification that a dismissal is "with prejudice." Of course, a party that objects to a dismissal with prejudice is entitled to take an appeal.

An approach intermediate between *Saylor*'s functional approach and *Weissinger*'s emphasis on the language of the order of dismissal would take equitable considerations into account in determining whether to enforce a dismissal "with

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(concluding, based on the present second sentence of Rule 41(b) and on the present text of Rule 41(a), that it is "[t]he scheme of the Rules" to "give full effect to unambiguous dismissal orders which specify that they are 'with prejudice' or 'without prejudice'").

prejudice." This is the position endorsed by the Restatement (Second) of Judgments. *See Restatement (Second) of Judgments* § 20 cmt. n (1982) (stating that "in some instances, the doctrines of estoppel or laches could require the conclusion that it would be plainly unfair to subject the defendant to a second action").[9] This approach is not as easy to apply as *Weissinger*'s bright-line rule, but is still superior to *Saylor*'s purely functional analysis.

The petitioners would prevail under either *Weissinger*'s rule or the equitable approach proposed by the Restatement. In this case, the district court's original dismissal was "with prejudice." Under *Weissinger*'s approach, the dismissal means what it says, and hence would be given claim-preclusive effect. The respondents were well aware that the district court's dismissal "with prejudice" could give rise to claim preclusion.[10] If they wished to contest this outcome, they should have filed a timely appeal.

The petitioners would also prevail under an equitable analysis. The district court's *forum non conveniens* dismissal imposed substantial burdens on the petitioners. It occurred

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[9] Indeed, the Reporter's Note to comment d to the same section cites *Weissinger* as an instance of the application of the principle set forth in comment n. The *Weissinger* court did comment on the equities of the case before it: it observed, for instance, that "a dismissal specified to be with prejudice, entered after full trial on all issues and with complete findings and conclusions," could not "be treated as a mere warm-up for another trial if the unsuccessful party decides, without an appeal, that he would like to go around the track again." 423 F.2d at 800. These observations appear to be an alternate ground for the *Weissinger* court's decision.

[10] *See* R. Vol. 6 at 1127 (asserting in a brief that defendants' "effort to obtain a dismissal with prejudice is a thinly veiled attempt to prevent prosecution of the Plaintiffs' claims not only in this forum, but also in the state courts," and specifically referring to the preclusive effect on the Louisiana suit).

after a detailed analysis (including submission by the petitioners of several affidavits secured in the Philippines), and required the petitioners to waive a number of valuable legal rights.[11] The respondents, for their part, instead of filing a timely appeal, availed themselves of the conditions imposed upon the *forum non conveniens* dismissal by initiating litigation in the Philippines. They therefore accepted the bargain inherent in the *forum non conveniens* dismissal.

3. The use of the *forum non conveniens* doctrine to dismiss cases better tried in foreign courts serves a number of important objectives. These include sparing the United States courts, which are "extremely attractive to foreign plaintiffs," the burden of excessive litigation, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981); sparing our courts the need to "untangle problems in conflict of laws," and in foreign law, *id.* at 251 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)); protecting the "local interest in having localized controversies decided at home," *Gulf Oil Corp.*, 330 U.S. at 509; freeing defendants from the burden of litigating in an inconvenient or "vexatious" forum, *id.* at 508; and furthering

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[11] These included waiving any challenge in the Philippines based on service of process, jurisdiction, the statute of limitations, and the use of U.S. discovery. Petitioners were also required to agree to produce witnesses and evidence in the Philippines, and to satisfy any final judgment of the Philippines courts. These were substantial concessions: to discuss only the last of them, petitioners thereby waived any defense to U.S. enforcement of a judgment of the courts of the Philippines based on failures of those courts to accord petitioners due process of law. *See Restatement (Second) of Conflict of Laws* § 98 (1971) (permitting such a defense). Especially given the magnitude of the plaintiffs' claims, the prejudice to the petitioners associated with foregoing these rights may fairly be compared with the prejudice to a defendant in an ordinary civil case who must "prepare to meet the merits," *Costello*'s test for the circumstances in which a judgment is typically claim preclusive. *See Costello*, 365 U.S. at 286.

international comity, *see American Dredging Co. v. Miller*, 510 U.S. 443, 466 (1994) (Kennedy, J., dissenting). Courts often do as the district court in the present case did, and place conditions on *forum non conveniens* dismissals designed to ensure that the plaintiffs can pursue their claims in the foreign forum. If conditional *forum non conveniens* dismissals are not claim-preclusive,[12] many plaintiffs will simply file a second suit (perhaps secretly, as the respondents did) in a State that applies a different *forum non conveniens* analysis, and the defendant will be compelled to begin litigation anew.[13] Thus, in the absence of claim preclusion, conditional *forum non conveniens* dismissals will have the perverse effect of assuring the plaintiffs *both* a United States forum *and* a more

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[12] A claim-preclusive *forum non conveniens* dismissal would not, of course, bar the prosecution of litigation in the appropriate foreign forum; it would, however, be claim-preclusive as to every other jurisdiction. Courts have the general power to limit the claim-preclusive effects of their own judgments, *see King v. Provident Life & Accident Ins. Co.*, 23 F.3d 926, 928-29 (5th Cir. 1994); *Restatement (Second) of Judgments* § 26(1)(b) (1982) (stating that claim preclusion does not apply if "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action"); that is what has occurred in the present case.

[13] Gaming is pervasive in *forum non conveniens* litigation; plaintiffs all too often bring a collection of actions in different fora, either simultaneously or *seriatim*. See, *e.g.*, *De Aguilar v. Boeing Co.*, 11 F.3d 55, 56 (5th Cir. 1993) (four state court filings, all of which were removed and dismissed on either *forum non conveniens* or collateral estoppel grounds); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993) (one federal and two state court filings), *cert. denied*, 510 U.S. 1044 (1994); *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176, 180 (5th Cir. 1990) (finding it an abuse of discretion for the district court to grant a plaintiff leave to obtain a voluntary dismissal from federal court in order to re-file in Louisiana court and thereby to escape the effect of the *forum non conveniens* doctrine, given the resulting prejudice to the defendant); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 848 (5th Cir. 1990).

hospitable foreign forum. It will be a rare defendant that will court this result by moving to dismiss on *forum non conveniens* grounds; the continued vitality of the doctrine is therefore at risk.[14] Permitting *forum non conveniens* dismissals to be claim-preclusive, and allowing a claim-preclusive dismissal to serve as the basis of an injunction, will ensure that the doctrine may be applied without leading to this sort of wasteful and burdensome jurisdictional mitosis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] In his dissent in *American Dredging*, Justice Kennedy suggested that that decision "makes *forum non conveniens* something of a derelict in maritime law." 510 U.S. at 468-69. Either *Staffer* or *Saylor* would extend this result to the law at large.